JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Thu Jul 24 13:48:00 2014

Deb Brata Das Gupta v Christopher Martin Boyd

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-03(IM)-114 OF 2013
RAMLY ALI, LIM YEE LAN AND DAVID WONG JJCA
7 OCTOBER 2013

B

Limitation — Arbitration award — Award registered as judgment — Whether limitation period of six years for enforcement of arbitral award became 12 years if award was registered as judgment — Whether arbitral award was contractual agreement between affected parties — Whether registration of award as judgment merely procedure to enable enforcement of award — Limitation Act 1953 s 6

C

D

The issue in this appeal concerned the effect in law of the registration of an arbitral award as a judgment and whether the six-year limitation period prescribed for an action to enforce an award under s 6 of the Limitation Act 1953 ('Act') would be enlarged to 12 years, if the award was registered as a judgment. The respondent had obtained an arbitral award against the appellant on 4 January 2000. To enforce the award he registered the same as a judgment in the High Court four years later. Based on the sum owing under the arbitral award the respondent caused a bankruptcy notice ('BN') and a creditor's petition ('CP') to be issued out to the appellant in April and May of 2012, respectively. The appellant applied to set aside the BN and CP, inter alia, on the ground the bankruptcy proceedings were time-barred under s 6 of the Act. The High Court held that since the arbitral award was registered as a judgment in 2004 the 12-year limitation period prescribed by s 6 of the Act for an action to enforce a judgment applied and the bankruptcy proceedings were therefore not time-barred.

E

F

G

Held, allowing the appeal and setting aside the decision of the High Court:

(1) The court agreed with the appellant that an arbitration award was an agreement and the court order to enforce the award was merely a procedure to enable enforcement. Any arbitral award emanated from the parties' mutual agreement to refer disputes to arbitration and the obligation to satisfy the arbitral award must also be contractual in nature and that right could only crystallise when the award was handed down. The registration of the arbitral award could not give more than what the parties had agreed in their contractual relationship. The registration could not recrystallise and give another few years of life to the parties' contractual rights. Hence, the registration or transformation of the arbitral award into a judgment was nothing but a mere procedure to enforce an award (see paras 10 & 12).

H

I

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Thu Jul 24 13:48:00 2014

(2) The crucial date for the calculation of the limitation period was 4 January 2000, and since the bankruptcy proceedings started on 4 April 2012, which was well after the six-year limitation period provided in s 6 of the Act, the bankruptcy proceedings were invalid and prohibited by the Act (see para 13).

[Bahasa Malaysia summary

Isu dalam rayuan ini berkenaan kesan undang-undang pendaftaran award timbang tara sebagai penghakiman dan sama ada tempoh had masa enam tahun yang ditetapkan untuk tindakan untuk menguakuasakan award di bawah s 6 Akta Had Masa 1953 ('Akta') boleh dilanjutkan kepada 12 tahun, jika award tersebut didaftarkan sebagai penghakiman. Responden telah memperolehi award timbang tara terhadap perayu pada 4 Januari 2000. Untuk menguatkuasakan award tersebut dia mendaftarkannya sebagai penghakiman di Mahkamah Tinggi empat tahun kemudian. Berdasarkan jumlah yang masih berhutang di bawah award timbang tara responden memohon untuk notis kebankrapan ('NK') dan petisyen pemiutang ('PP') dikeluarkan kepada perayu dalam bulan April dan Mei 2012, masing-masing. Perayu memohon untuk mengetepikan NK dan PP, antara lain, atas alasan prosiding kebankrapan tersebut dihalang masa di bawah s 6 Akta. Mahkamah Tinggi memutuskan bahawa memandangkan award timbang tara didaftarkan sebagai penghakiman pada tahun 2004 tempoh had masa 12 tahun yang ditetapkan oleh s 6 Akta untuk tindakan menguatkuasakan penghakiman diguna pakai dan prosiding kebankrapan oleh itu tidak dihalang masa.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Mahkamah bersetuju dengan perayu bahawa award timbang tara adalah perjanjian dan perintah mahkamah untuk menguatkuasakan award hanya prosedur untuk membolehkan penguatkuasaan tersebut. Apa-apa award timbang tara yang berbangkit daripada perjanjian bersama pihak-pihak dirujuk kepada timbang tara dan tanggungjawab untuk memenuhi award timbang tara mesti juga bersifat kontrak dan hak yang boleh diperjelaskan apabila award diberikan. Pendaftaran award timbang tara tidak dapat memberi lebih daripada apa yang dipersetujui oleh pihak-pihak dalam hubungan kontrak mereka. Pendaftaran tidak dapat diperjelaskan semula dan memberi beberapa tahun lagi masa kepada hak kontrak pihak-pihak. Maka, pendaftaran atau transformasi award timbang tara kepada penghakiman adalah semata-mata prosedur untuk menguatkuasakan award (lihat perenggan 10 & 12).

(2) Tarikh penting untuk pengiraan tempoh had masa adalah 4 Januari 2000, dan memandangkan prosiding kebankrapan bermula pada 4 April 2012, yang mana selepas tempoh had masa enam tahun yang diperuntukkan di dalam s 6 Akta, prosiding kebankrapan tersebut adalah

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Thu Jul 24 13:48:00 2014

tak sah dan dilarang oleh Akta tersebut (lihat perenggan 13).] A

Cases referred to

National Ability SA v Tinna Oils and Chemicals Ltd; The Amazon Reefer [2010] 2 All ER 899, CA (folld) B

Legislation referred to

Limitation Act 1953 s 6

Appeal from: Civil Appeal No S29–1851–04 of 2012 (High Court, Kuala Lumpur) C

T Gunaseelan (Gunaseelan & Assoc) for the appellant.
Kiu Jia Yaw (HL Lee & Co) for the respondent.

David Wong JCA (delivering judgment of the court): D

INTRODUCTION

[1] This appeal is in respect of a High Court decision in which the learned judge dismissed an appeal by the appellant from the learned deputy registrar in which on 30 November 2012 he had refused to set aside the bankruptcy notice and creditor's petition dated 4 April 2012 and 3 May 2012 respectively. E

[2] We heard the appeal and after giving due consideration to submissions of respective counsel, we allowed the same and now give our reasons. F

BACKGROUND FACTS

[3] The respondent had on 4 April 2000 obtained an arbitral award against the appellant and on 19 January 2004, the respondent obtained an order of the High Court to register the arbitral award for the purpose of enforcing the same. G

[4] The respondent premised on that registered arbitral award issued a bankruptcy notice on 4 April 2012 and creditor's petition on 3 May 2012 to recover the amount set out in the same from the appellant. H

HIGH COURT DECISION

[5] At the appeal before the learned judge, the appellant's grounds (as set out in the submission of learned counsel for the appellant) for setting aside the bankruptcy notice and creditor's petition were as follows: I

(a) the bankruptcy notice dated 4 April 2012 and the creditor's petition which were based on arbitral award 4 January 2000 is barred by s 6 of the

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Thu Jul 24 13:48:00 2014

Limitation Act 1953 which prescribes any action for enforcing an award is six years. And since the bankruptcy proceedings had only commenced after six years, the same are invalid;

(b) the affidavit verifying the truth of the petition dated 3 May 2012, is invalid as no copy of the creditor's petition is annexed to the same; and

(c) the bankruptcy notice is invalid as the computation of interest is not in accordance with the judgment dated 19 January 2004.

[6] The learned judge did not sustain the grounds of the appellant and dismissed the appeal from the deputy registrar.

[7] In respect of ground 1, the learned judge relied on the registration of the arbitral award date which is 19 January 2004 to determine the 12 year limitation period. His rationale though not explained in details is simply that since there is now a judgment dated 19 January 2004 through the registration of the arbitral award, that judgment gave an extended life span to the 2000 arbitral award. Further as the judgment had not been stayed, it was held to be binding on the appellant presumably on the ground the respondent bankruptcy proceedings is well within the 12 years limitation period for enforcing a judgment.

OUR GROUNDS OF DECISION

[8] It is our considered view that this appeal can be dispensed with the determination of the single issue of whether the respondent's bankruptcy proceedings is time barred.

[9] To reiterate, the foundation of the bankruptcy proceedings is the arbitral award dated 4 January 2000 and this arbitral award was then transformed into a judgment on 19 January 2004.

[10] As to how the arbitral award should be treated in law is the determinative factor in this appeal. We agree with the submission of learned counsel for the appellant that an arbitration award is an agreement and the order to enforce the award is merely a procedure to enable enforcement.

[11] Learned counsel for the appellant relied on the case of *National Ability SA v Tinna Oils and Chemicals Ltd; The Amazon Reefer* [2010] 2 All ER 899 where the court held as follows:

> There was a clear distinction between an arbitral award and a judgment. An arbitration agreement was in essence enforceable because of the implied contractual promise to pay an arbitral award contained in the arbitration agreement; all measures of enforcement essentially rested upon the contract. The provisions of s 26

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Thu Jul 24 13:48:00 2014

of the 1950 Act had to be seen in that context. They were simply procedural provisions enabling the award made in consensual arbitral proceedings to be enforced. That was quite different from the pronouncement of a judgment by a court where the state through its court had adjudged money to be due.

[12] We see no reason to depart from the just quoted passage and have no hesitation in adopting it. Any arbitral award emanates from the parties' mutual agreement to refer disputes to arbitration and the obligation to satisfy the arbitral award must also be contractual in nature and that rights can only crystalise when the arbitral award is handed down. The registration of the arbitral award cannot give more than what the parties had agreed in their contractual relationship. That registration cannot recrystallise and give another few years of life to the parties' contractual rights. Hence the registration or the transformation of the arbitral award into a judgment is nothing but a mere procedure to enforce an award.

[13] Reverting to the appeal at hand, the crucial date for calculation of the limitation period must then be 4 January 2000 and hence since the bankruptcy proceedings started in 4 April 2012 which is well after the six years limitation period as provided in s 6 of the Limitation Act 1953, we are constrained to hold that the respondent's bankruptcy proceedings is invalid and prohibited by the Limitation Act.

[14] In view of our decision on Limitation Act issue, there is no necessity for us to comment on the other grounds raised by the appellant.

CONCLUSION

[15] For reasons stated above, we allowed the appeal with no order as to costs and ordered the deposit to be refunded. We also order that the decision of High Court to be set aside.

Appeal allowed and decision of the High Court set aside.

Reported by Ashok Kumar